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No. 01-1477

IN THE

Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
Petitioners,

v.

MCI WORLDCOM NETWORK SERVICES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

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ARGUMENT IN REPLY

The United States Constitution protects the States and administrative agencies under their control[1] from "any suit in law or equity." The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State,

[1] *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

or by citizens or subjects of any foreign State." U.S. CONST. amend XI. Contrary to the decision of the United States Court of Appeals for the Third Circuit, this case is a textbook example of what is prohibited by the Eleventh Amendment. Contrary to the position of respondents United States and WorldCom, nothing about the recent holding in *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 122 S. Ct. 1753 (2002) (*Verizon Maryland*), requires a denial of this petition. See U.S. Br. at 7-9; WorldCom Br. at 12-13. Thus, the petition should be granted.

In this case, federal district courts have exercised jurisdiction over suits containing federal questions brought by a Delaware corporation against Petitioner Pennsylvania Public Utility Commission (PUC), an administrative agency acting under the control of the Commonwealth of Pennsylvania. Respondents MCI WorldCom Network Services, Inc (formerly MCI Telecommunications Corp.) and MCI Metro Access Transmission Services, Inc. (collectively "WorldCom") are corporations organized under the laws of the State of Delaware and are wholly owned subsidiaries of WorldCom, Inc., a Georgia corporation. *See* App. 1a; WorldCom Br. at ii. Being non-Pennsylvania corporations, respondents are "citizens of another State" [2] vis-a-vis Petitioner PUC. Thus, the constitution immunizes the PUC from "[this] suit in law or equity." U.S. CONST. amend XI.[3]

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[2] A corporation is a citizen of the state in which it is incorporated. See, e.g., *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, ___ S. Ct. ___ , ___ (2002)(2002 U.S. LEXIS 4203) (holding that a "corporation of a foreign State is, for purposes of jurisdiction in the courts of the United States, to be deemed, constructively a citizen or subject of such State.").

[3] This protection extends to federal suit commenced "by [Pennsylvania's] own citizens as well." *Lapides v. Board of Regents of Univ. System of Georgia*, 122 S. Ct. 1640, 1642 (2002), citing *Hans v. Louisiana*, 134 U.S. 1 (1890).

The question of jurisdiction over the PUC is relevant because jurisdiction over the PUC is required in order to grant relief requested in the underlying federal complaints arising from 47 U.S.C. § 252.[4] The scope of available relief strikes at the heart of any litigation, including this one where the private party litigants seek, and a district court has granted, a remand to the PUC for further proceedings. *See* Pet. s.a. 5-6 (reproducing district court order "remand[ing] to the PUC to reform the interconnection agreement" and "remand[ing] to the PUC to reconsider its decision regarding pricing of unbundled network elements.").[5] The relief requested is dependent upon the federal district court having the power to affirm, reverse or modify the challenged order and to remand for further proceedings.

In order for a federal district court to have jurisdiction, the PUC's immunity from "any suit" must have been waived. Absent waiver, the "appellate" federal district court may be able to enjoin enforcement of the PUC's order under *Verizon Maryland*,[6] but will be otherwise reduced to an "advisory" court.

This Court has not yet decided whether Eleventh Amendment immunity is waived when a State commission, like the PUC, renders an adjudication that approves or rejects an interconnection agreement, pursuant to 47 U.S.C. § 252. *Verizon Maryland Inc. v. Public Serv. Comm'n of Md.*, 122 S.

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[4] *Verizon Maryland Inc. v. Public Serv. Comm'n of Md.*, 122 S. Ct. at 1763 (Souter, J., concurring) (noting characterization of §252 actions as a "means of appellate review.").

[5] The establishment of unbundled network element rates is a matter particularly reserved to the States. *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 384 (1999).

[6] Petitioners do not concede there is such authority. Petitioners submit that their arguments in opposition to jurisdiction over the individually named commissioners in this arbitration case continue to have force and should be accepted by this Honorable Court. *See* Pet. at 21, 22-26.

Ct. at 1760. The *Verizon Maryland* Court was able to avoid an Eleventh Amendment inquiry because the relief at issue in that case was narrower in scope than the relief sought in this case. The relief sought in *Verizon Maryland* was limited to a request "that state officials be restrained from enforcing an order in contravention of controlling federal law." *Id.* It did not contemplate a remand for further state proceedings.

Any application of the *Verizon Maryland* decision to avoid the waiver issue in this case, i.e., where relief is a remand, would render the Eleventh Amendment itself a fiction and conflict with established law. A remand would compel state action in the form of a further adjudication, a greater intrusion on States than enjoining the State from acting. This Court has previously recognized that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. U.S.*, 521 U.S. 898, 925 (1997). While Federal courts have the power to ensure the supremacy of federal law, their power is concomitant with the duty to give "appropriate consideration . . . to principles of federalism in determining the availability and scope of equitable relief." *Rizzo v. Goode*, 423 U.S. 362, 379 (1976). Thus, federal law dictates that federal courts cannot use their jurisdiction over state officials under *Verizon Maryland* to compel the PUC to exercise its state authority to enforce, execute and carry out regulation on behalf of the Federal Government.

Petitioners contend jurisdiction over the PUC is lacking and have respectfully submitted the question for the Court's consideration. Pet. 13-22. Respondents oppose Petitioners' request on the erroneous theory that it is no longer necessary for the Court to reach the question of waiver. See WorldCom Br. at 17 (arguing the Court's decision in *Verizon Maryland* makes it "unnecessary for it to decide the waiver issue"); U.S. Br. at 8 (arguing the Court does "not have to decide whether a State waives its sovereign immunity"). Indeed, WorldCom

suggests that the issue is "purely academic" contending that "the *only* impact of reversal on the waiver question would be to require the ministerial deletion of the Pennsylvania Commission (as a body) from the caption, and the case still would proceed against the commissioners in their official capacities under *Ex parte Young*."[7] WorldCom Br. at 17.

Respondents' view of this case is wrong for a number of related reasons. First, mere jurisdiction over the individual commissions under the *Verizon Maryland* decision will not suffice to do anything more than enjoining enforcement of the challenged order; it does not authorize the district court to compel formal proceedings before the PUC.[8] Second, as explained, the *Verizon Maryland* Court did not decide the scope of relief available, if any, against Petitioner PUC.

Third, state immunity is implicated because any grant of the relief requested by the private parties in this case will deplete state resources, a factor not found in *Verizon Maryland*. Respondent WorldCom does not seek "money" from the PUC, but it does seek "time." The PUC resources required to satisfy the underlying complaint are not *de minimus* nor would the desired PUC action be ministerial. For example, based on a recent Pennsylvania unbundled network element rate case, it would be reasonable to budget 300 hours of time for a PUC administrative law judge with expertise in telecommunications to preside over a proceeding

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[7] 209 U.S. 123 (1908).

[8] Individual PUC commissioners have no authority to take official action on behalf of the PUC, except for certain emergency situations not applicable here. Official action of the PUC can only take place in the context of a public meeting at which a unanimous vote of the majority of sitting commissioners must act to approve such action. 65 P.S. §§ 271-286, 66 Pa.C.S. § 301(d).

to establish generic rates for unbundled network elements and to draft an initial determination on what the rates should be. The total amount of time needed would be greater.[9]

Fourth, the requested relief appears to expose the PUC to the contempt powers of the court in the event the PUC decided not to conduct further proceedings.[10] Thus, WorldCom's request for relief renders the question of the "appellate" court's jurisdiction over the PUC far from an academic question.

Petitioners have consistently maintained that the Commonwealth Court of Pennsylvania is the only legitimate appellate court of first instance in this case. Pet. at 27; Pet. App. at 62a (declining to decide whether preclusive effect should be given to Commonwealth Court decision on identical issues raised by the same parties); Pet. Supp. App. at sa-43 (noting Commonwealth Court proceeding) and sa-57-58 (declining to decide whether federal court review is exclusive).

The Third Circuit and Respondents attempt to avoid the thorny issue of state court review of state administrative agency decisions by claiming that the PUC has accepted a "grant of regulatory power offered by Congress . . . [with] conditions attached to that grant of power." Pet. at 25a. One of those conditions is waiver of immunity and another is

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[9] In addition to the assigned ALJ, other PUC employees also contribute to the effort, including, but are not limited to, employees in the Secretary's Bureau (*e.g.*, receiving, distributing, and filing documents), the Office of Special Assistants (*e.g.*, reviewing exceptions and reply exceptions filed to the ALJ's recommended decision and drafting a proposed order for the Commission's approval), and the five individual commissioners (*e.g.*, reviewing the record and staff recommendations, voting on proposed findings of fact and conclusions of law).

[10] The PUC is naturally inclined to cooperate with the Federal Government in this important matter of the development of competitive local telecommunications markets. Nevertheless, the PUC cannot be "dragooned." See *Printz v. U.S.*, 521 U.S. at 928.

prohibition of state court review. Petitioners have adamantly opposed the concept that they accepted—or even have the power to accept—such conditions. Pet. at 19-20, 27.[11]

Petitioners present a legitimate dispute on whether they have consented to waive the Commonwealth of Pennsylvania's immunity and power of state court review in order to "regulat[e] on behalf of Congress." See Pet. at 25a. Petitioners submit they have "not consent[ed] to become mere appendages of the Federal Government," *Federal Maritime Comm'n v. South Carolina Ports Auth.*, 122 S.Ct. 1864, ____ (2002) (slip. op. at 6), when they apply the requirements of 47 U.S.C. §252 to certificated public utilities operating in Pennsylvania, including Respondent WorldCom and the other private party litigants. Moreover, Respondents have not even advanced any argument to refute the fact that Pennsylvania statutes carefully preserve immunity, not waive it. This Honorable Court should resolve the dispute in order to "accord States the dignity that is consistent with their status as sovereign entities." *Id.* at ___ (slip op. at 14).

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[11] After invoking the Commonwealth Court's jurisdiction and obtaining a judgment on federal questions, Respondent WorldCom reversed its position on the Commonwealth Court's jurisdiction in a matter now pending before the Supreme Court of Pennsylvania. *WorldCom, Inc. v. Pennsylvania Pub. Util. Comm'n*, No. 1 EAP 2002 (Pa.). Petitioner PUC, in its official role as respondent in WorldCom's state court action, maintains that was lawful for the Commonwealth Court to review the PUC's section 252 order (the very same order underlying the instant petition before this Honorable Court) and that any attempt to sever the PUC from the state court's oversight is unconstitutional.

CONCLUSION

For all the reasons above, as well as the reasons set forth in the Petition, Petitioners respectfully submit that the Court should grant this petition for writs of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

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